WAYNE D. KLUMP
v.
BUREAU OF LAND MANAGEMENT

IBLA 91-420, 91-421 Decided October 13, 1992

Appeals from orders of Administrative Law Judge John R. Rampton, Jr., dismissing appeals from final decisions of the San Simon Area Manager, Bureau of Land Management, denying requested changes to grazing applications. AZ-040-91-06, AZ-040-91-07.

Affirmed.

1. Grazing and Grazing Lands--Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals

BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges, and a BLM decision concerning grazing privileges will not be set aside if it is reasonable and substantially complies with the provisions of the Federal grazing regulations found at 43 CFR Part 4100. BLM's decision may be regarded as arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and the burden is on the objecting party to show that a decision is improper.

APPEARANCES: Wayne D. Klump, pro se; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Wayne D. Klump has appealed from two orders of Administrative Law Judge John R. Rampton, Jr., dated July 12, 1991 (IBLA 91-420, AZ-040-91-06), and July 11, 1991 (IBLA 91-421, AZ-040-91-07), dismissing appeals from two final decisions of the San Simon Area Manager, Bureau of Land Management (BLM), both dated February 15, 1991. These decisions denied Klump's requested changes to grazing applications for the Simmons Peak Allotment No. 51280 and the Little Doubtful Allotment No. 50610, respectively. Because the issues raised in these appeals overlap, we have consolidated them for review. 1/

1/ Klump's and BLM's appeal submissions in IBLA 91-420 and IBLA 91-421 are identical and refer to both docket numbers.

Simmons Peak Allotment No. 51280

On April 2, 1981, the Acting Safford District Manager, BLM, issued a proposed decision adjusting Klump's authorized active grazing use on the Simmons Peak Allotment No. 51280 (then called Dos Cabezas Allotment No. 5128) from 735 animal unit months (AUM's) or 85 cattle year long (CYL's) at 72-percent Federal range to 364 AUM's or 44 CYL's at 69-percent Federal range, with the reduction to be phased in over a 5-year period. BLM explained that after analyzing the resource conditions of the public lands within the Upper Gila-San Simon Resource Area, it had determined that the adjustment was necessary to improve the allotment's forage conditions, one of the objectives established in the Upper Gila-San Simon Rangeland Management Program document for the allotment. BLM indicated that it was conducting monitoring studies which would form the basis for evaluating progress toward meeting allotment objectives and revising authorized grazing use. Klump did not protest or appeal this BLM decision.

In a proposed decision dated August 16, 1983, the San Simon Area Manager, BLM, found that the terrain and vegetation on the Simmons Peak Allotment No. 51280 made the determination of livestock numbers and ownership difficult. He, therefore, decided that ear tags would be required on livestock grazing on the allotment and added the eartagging requirement as a term and condition of Klump's grazing permit. Klump did not protest or appeal this decision.

On January 14, 1991, Klump filed his grazing application for the Simmons Peak Allotment No. 51280. In accordance with the instructions on the pre-printed form for making changes in the grazing schedule, Klump crossed out the 44 cattle and 391 AUM's appearing on the form and inserted 65 cattle and 577 AUM's. In the section of the application marked Terms and Conditions, he added the word "Custodial" and deleted the eartagging requirement. He also changed the term grazing "preference" to grazing "right."

On January 29, 1991, the Area Manager issued a proposed decision rejecting Klump's changes to the grazing application. The Area Manager cited BLM's August 16, 1983, decision mandating eartagging on the allotment. He noted that the allotment had been categorized as an Improve allotment based on the district's criteria for classifying allotments into management categories and found that the allotment did not meet the criteria to be changed to a Custodial allotment. He further indicated that BLM records demonstrated that the grazing capacity on the allotment was 44 cattle or horses year long. Accordingly, the Area Manager determined that the allotment should remain classified in the Improve category, that eartagging should continue as a term and condition of the permit, that the grazing application should be approved for 44 CYL's, and that Klump's request for 21 additional cattle should be denied.

Klump protested the proposed decision arguing that: "1. Eartagging does not work[;] 2. Area would fit into custodial category better than improve[; and] 3. Denying me 21 CYL's is reducing the value of [my] ranch."

In his February 15, 1991, final decision, the Area Manager repeated that eartagging had been a term and condition of Klump's grazing permit since first imposed by BLM's August 16, 1983, decision, and that the allotment had been properly classified as Improve because it did not meet the criteria to be changed to Custodial. He also noted that on April 2, 1981, BLM had established 44 CYL's as the grazing capacity of the allotment. The Area Manager stated that an increase in CYL's had to be supported by longterm monitoring studies, and indicated that BLM's monitoring studies did not support authorizing additional CYL's on the allotment. Therefore he again concluded that to promote the orderly administration of the public lands within the allotment, the allotment would continue to be categorized as Improve, that eartagging would remain in effect, that the application would be approved for 44 CYL's, and that Klump's request for the additional 21 CYL's would be denied.

Klump appealed BLM's final decision to an Administrative Law Judge. He reiterated the arguments raised in his protest and added several other issues centering on the Government's alleged attempts to deprive him of his water rights and other property rights. Klump demanded full due process of law and an evidentiary hearing.

BLM responded by filing a motion to dismiss the appeal, to which Klump replied by repeating his demand for a hearing.

In his order dismissing Klump's appeal, Judge Rampton concluded that Klump had neither addressed the rationale stated in the Area Manager's decision nor asserted errors in that decision. Instead, the Judge found that Klump had presented facts irrelevant to BLM's decision, and that the appeal on its face was frivolous and without merit. Accordingly, he granted BLM's motion and dismissed the appeal.

Little Doubtful Allotment No. 50610

By proposed decision dated January 16, 1981, and addressed to Karry K. Klump, 2/ the Safford District Manager set the authorized grazing use of the Little Doubtful Allotment No. 50610 at 480 AUM's or 40 CYL's. On August 16, 1983, the San Simon Area Manager issued a proposed decision, also addressed to Karry K. Klump, requiring ear tags as a term and condition of the grazing permit because the terrain and vegetation present on the allotment made the determination of livestock numbers and ownership difficult. No protest or appeal from either of these decisions was filed.

2/ Although the grazing preference for this allotment apparently was transferred to Wayne D. Klump at some point, the case file does not contain any record of this transfer.

On January 14, 1991, Wayne D. Klump filed a grazing application for the Little Doubtful Allotment No. 50610. Under the Terms and Conditions section of the pre-printed form, Klump added the word "Custodial" and deleted the eartagging requirement. He also substituted the term grazing "rights" for grazing "preference."

In his January 29, 1991, proposed decision, the San Simon Area Manager determined that the allotment should remain classified in the Improve category because it did not meet the management criteria to be placed in the Custodial category. He further concluded that eartagging should continue as a term and condition of the grazing permit, noting that eartagging had first been required by BLM's August 16, 1983, decision.

Klump protested the proposed decision, asserting that the "[a]rea would fit into custodial category better than improve," and that "[e]artagging does not work."

By final decision dated February 15, 1991, the Area Manager denied the protest. He repeated that the allotment had been properly categorized as an Improve allotment which did not qualify for the Custodial designation, and that eartagging had been a requirement on the allotment since August 16, 1983. Accordingly, he decided that the allotment would stay in the Improve category and eartagging would remain in effect.

Klump appealed the final decision to an Administrative Law Judge, repeating the issues raised in his protest. Klump also asserted that the Government was trying to take away his water and other property rights and demanded full due process and an evidentiary hearing.

BLM moved to dismiss Klump's appeal and Klump responded by reasserting his demand for an evidentiary hearing.

By order dated July 11, 1991, Judge Rampton granted BLM's motion to dismiss the appeal. He found that Klump had not challenged the reasons forming the basis for the Area Manager's decision, but instead had submitted a dogmatic claim of rights not material to that decision. The Judge noted that eartagging had been imposed by BLM's August 16, 1983, decision, which became final 15 days after issuance because it had not been protested, and concluded that Klump was barred from contesting that decision in this appeal. Thus, the Judge dismissed the appeal as frivolous.

Issues on Appeal

On appeal 3/ Klump renews his contention that both allotments should be classified as Custodial rather than Improve, arguing that his ranching

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3/ Klump has filed three appeal documents: a Notice of Appeal and Statement of Reasons received on Aug. 5, 1991, a submission entitled "Appellant's

experience and life-time experience in the area justify this classification. He claims that BLM's categorization of the allotments as Improve was arbitrary and capricious because BLM has never spent any money on his ranch.
Klump further insists that BLM has neither the authority nor the jurisdiction to place his ranch into the Improve category or to take away any of his rights, including his grazing and water rights. 4/

Klump explains that he did not protest the eartagging requirement when it was first imposed because he had never used ear tags before. Now that he has used them, he argues that eartagging does not work and that it is impossible to comply with that requirement. Klump claims that cattle lose between 5 and 50 percent of their tags each year, thus placing him in a trespass situation through no fault of his own. Klump, therefore, asserts that the eartagging requirement is arbitrary and capricious, unlawful, and unconstitutional.

Klump contends that he did not protest BLM's 1981 reduction of his authorized grazing use on the Simmons Peak Allotment No. 51280 at that time because he thought the adjustment would be temporary. He argues that the decrease in CYL's lowered the value of his ranch and violated his constitutional rights by taking his property without just compensation. If BLM does not restore his numbers, Klump demands that he be compensated for the economic damage he has suffered.

Klump also argues that he has been denied due process because he has not been afforded an evidentiary hearing. Additionally, he challenges the validity of the regulations found at 43 CFR 4.470(a) and (b) and at 43 CFR Part 4100, charging that they are unconstitutional and arbitrary and capricious. 5/

In response 6/ BLM counters that the appealed decisions are supported by substantial evidence and substantially comply with the grazing regulations, and that Klump has failed to demonstrate that the decisions are

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fn. 3 (continued)
Arguments" received on Sept. 5, 1991, and an "Answer of Appellant to Respondents [sic] Arguments" received on Nov. 25, 1991. Our discussion of Klump's appeal arguments include arguments raised in all three of these submissions.
4/ Klump maintains that he has grazing rights and not simply grazing preferences on these allotments. However, the issuance of a grazing permit pursuant to the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1988), does not "create any right, title, interest, or estate in or to the lands."
See also Holland Livestock Ranch v. United States, 655 F.2d 1002, 1005 (9th Cir. 1981).
5/ The other issues raised by Klump, including his insistence that the Government wants to deny his claimed water and property rights and that the entire Department of the Interior is unconstitutional, as well as his demand for a jury trial, exceed the jurisdiction of this Board.
6/ BLM has submitted both an answer and a reply to Klump's answer.

arbitrary, capricious, or inequitable. BLM discounts Klump's general challenge to its authority to manage grazing on public land, noting that the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (1988), and the grazing provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1751-1753 (1988), grant the Secretary of the Interior broad discretion in managing grazing use on public lands and that the Secretary has delegated this responsibility to BLM. The grazing regulations found at 43 CFR Part 4100, BLM explains, implement the grazing provisions of the statutes.

BLM disputes each of Klump's principal arguments. 7/ Specifically, BLM contends that it properly classified the allotments in the Improve category. It states that it developed a range classification system for livestock grazing in the Safford District which contains three categories: Improve, Maintain, and Custodial. BLM cites the criteria for each category and asserts that the record amply supports its determinations that both allotments fall within the Improve class. BLM argues that Klump has failed to demonstrate that either of these allotments meets the standards for the Custodial classification.

BLM maintains that Klump's admitted failure to protest the eartagging requirement when it was first imposed in 1983 bars him from now contesting that requirement. In any event, BLM asserts, both the grazing regulations and relevant case law clearly uphold the use of ear tags as a valid grazing management tool, even if the eartagging requirement imposes a burden on livestock operators.

BLM argues that because Klump did not protest or appeal the 1981 decision reducing the authorized number of CYL's on the Simmons Peak Allotment No. 51280, he is precluded from challenging that reduction in this appeal. BLM further contends that Klump does not own the public land to which his grazing permit applies, nor does he have an inherent right to graze 65 cattle on the allotment. BLM stresses that a grazing permit does not grant the permittee a right or interest in public grazing lands as against the Federal Government. BLM asserts that it has the regulatory authority to impose reasonable terms and conditions on a grazing permit, and that modifying the active grazing use on an allotment clearly falls within its authorized discretion. BLM thus denies that its adjustment decision constituted a compensable taking.

7/ BLM has also requested that Klump's appeals be summarily dismissed on the ground that his appeal submissions do not affirmatively point out why the appealed decisions are in error. While Klump's appeal documents contain little more than conclusory allegations of error which will not suffice to establish error in the decisions under appeal, see, e.g., United States v. Fletcher De Fisher, 92 IBLA 226, 227 (1986), we find that his appeal documents are adequate to withstand BLM's dismissal motion. Accordingly, we deny that motion. We also deny BLM's motion to strike portions of Klump's response to its answer.

Klump's challenge to the validity of the grazing regulations must fail, BLM maintains, because this Board has no authority to declare invalid duly promulgated regulations of the Department. BLM also disputes Klump's claimed denial of his due process rights, arguing that appeals to this Board fulfill due process requirements. In short, BLM submits that Klump's failure to meet his appellate burden mandates that the appealed decisions be affirmed.

[1] Implementation of the Taylor Grazing Act of June 24, 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1988), is committed to the discretion of the Secretary of the Interior. Yardley v. BLM, 123 IBLA 80, 89 (1992), and cases cited therein. Section 2 of the Taylor Grazing Act charges the Secretary, with respect to grazing districts on public lands, to "make such rules and regulations" and to "do any and all things necessary * * * to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range * * *." 43 U.S.C. § 315a (1988). The provisions of FLPMA amending the Taylor Grazing Act reiterate the Federal commitment to the protection and improvement of Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1988).

BLM, as the Secretary's delegate, enjoys broad discretion in determining how to manage and adjudicate grazing preference. Yardley v. BLM, 123 IBLA at 90. An adjudication of grazing privileges will not be set aside on appeal if it is reasonable and substantially complies with Departmental grazing regulations found at 43 CFR Part 4100. 43 CFR 4.478(b). When BLM adjudicates grazing privileges in the exercise of its administrative discretion, that action may be regarded as arbitrary, capricious, or inequitable only where it is not supportable on any rational basis. The burden is on the objecting party to demonstrate that a decision is improper. Yardley v. BLM, 123 IBLA at 90; Glanville Farms, Inc. v. BLM, 122 IBLA 77, 87 (1992); Fasselin v. BLM, 102 IBLA 9, 14 (1988).

We conclude that Klump has not demonstrated that the BLM decisions are improper or that Judge Rampton erroneously dismissed his appeals from those decisions. As an initial matter, we reject Klump's challenge to the validity of 43 CFR Part 4100 and 43 CFR 4.470(a) and (b). The Board has no authority to declare invalid duly promulgated regulations of the Department. Such regulations have the force and effect of law and are binding on the Department. Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990), and cases cited therein. We also find that Klump's claim of lack of due process is without merit. Due process does not require notice and a prior opportunity to be heard in all cases in which there is an alleged impairment of property rights as long as the person is given notice and an opportunity to be heard before the alleged impairment becomes final. Appeal to the Board of Land Appeals satisfies the due process requirements. Davis Exploration, 112 IBLA 254, 260 (1989); Santa Fe Pacific Railroad Co., 90 IBLA 200, 220 (1986).

Although Klump contests BLM's classification of the allotments as Improve allotments, he has offered no evidence substantiating his opinion that the allotments should be in the Custodial category. Such conclusory allegations, unsupported by evidence showing error, do not suffice to affirmatively demonstrate error. See, e.g., J. W. Weaver, 124 IBLA 29, 31 (1992); Glanville Farms, Inc. v. BLM, 122 IBLA at 85; Shama Minerals, 119 IBLA 152, 155 (1991), and cases cited therein. Additionally, the record contains ample justification for BLM's categorization of the allotments as Improve allotments. We, therefore, find that BLM properly denied Klump's request to place the allotments in the Custodial category.

Klump admits that he did not protest or appeal the August 1983 decisions requiring eartagging of cattle on the allotments. Under 43 CFR 4.470(b), a permittee who fails timely to appeal a final decision of the authorized officer "shall be barred thereafter from challenging the matters adjudicated in that final decision." Thus Klump's failure to appeal from the 1983 eartagging decisions precludes him from now contesting the eartagging requirement. See also San Juan County Commission, 123 IBLA 68, 71 (1992), and cases cited therein (failure to appeal a decision renders it final and doctrine of administrative finality precludes subsequent challenge). In any event, the regulations in effect when the 1983 decisions were issued, as well as current regulations, specifically authorize BLM to require the tagging of livestock in order to control unauthorized grazing use or to promote the orderly administration of the public lands. 43 CFR 4120.4(d) (1983); 43 CFR 4130.5(c). This Board has also upheld BLM's authority to require eartagging on public lands. See Rees Land & Livestock Co. v. BLM, 82 IBLA 265 (1984); C. Punch Corp., 67 IBLA 293 (1982). Accordingly, we uphold BLM's imposition of eartagging as a term and condition of Klump's grazing permits.

Although Klump's failure to appeal from the 1981 decision reducing his authorized active grazing use on the Simmons Peak Allotment No. 51280 prevents him from now disputing the validity of that adjustment, see 43 CFR 4.470(b), he has timely appealed BLM's denial of his requested increase in CYL's. We find, however, that Klump has failed to show that BLM improperly refused to raise his CYL's. A BLM determination of the grazing capacity available for livestock will not be overturned in the absence of a clear showing of error. Lines v. BLM, 76 IBLA 170, 172 (1983). BLM denied Klump's request because its monitoring studies did not support the requested numbers. BLM may properly refuse to increase a permittee's grazing preference absent proof from monitoring studies to support such action. See Miller v. BLM, 118 IBLA 354, 363 (1991). Since Klump has provided no evidence demonstrating that the allotment is capable of supporting the additional 21 head of cattle, but has simply claimed that he has a right to the additional cattle, we uphold BLM's refusal to increase his active grazing use.

To the extent not specifically addressed herein, appellant's arguments have been considered and rejected. Because Klump has not demonstrated that

the Area Manager's decisions were arbitrary, capricious, or inequitable, we conclude that Judge Rampton properly dismissed Klump's appeals from those decisions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

John H. Kelly
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge